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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 134

WILLIAM C. GREENE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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Three matters are discussed in this reply brief:

(1) The Court's decision of December 15, 1958, in *Ladner* v. *United States*, No. 2, this term, which respondent does not discuss in its brief;

(2) Respondent's apparent confusion about what the different-evidence (*Blockburger*) test is and what burden it places on the prosecution; and

(3) The significant degree to which respondent's own defense of the *Claassen* rule as applied below embodies the vices of the rule itself.

I.

This Court's Recent Decision in Ladner v. United States Further Exposes the Arbitrariness of the Gore Decision.

Since *Gore* v. *United States*, 357 U.S. 386, this Court has decided *Ladner* v. *United States*, No. 2, this term, another case applying the "rule of lenity" even to crimes of violence. That decision further emphasizes the arbitrary and exceptional nature of *Gore*. It obviously may be said that the distinction between the two cases is that only one code provision applied to Ladner, whereas three apply to the narcotic offender. But that distinction, as we have previously pointed out, is frequently one without a difference and in any event is a weak, mechanical basis for deciding whether the same conduct authorizes single or multiplied punishment. Moreover, it raises the very real possibility that even a narcotics offender who is "lucky enough" to be indicted twice under one code provision, rather than once under two provisions as petitioner was, will receive only half as heavy a sentence. (See *Yancy* v. *United States*, 252 F.2d 554 (C.A. 6), petition for certiorari now pending, No. 64 Misc., this term, which raises that question, in the light of the *Gore* decision.[1] Certainly *Ladner* and the earlier "rule of lenity" cases suggest that result; yet the choice between these two basic patterns of prosecution is open to the U.S. Attorney in virtually every narcotics case. Of course, the penal consequences to the accused of the particular choice made may be drastic indeed.

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[1] Yancy was indicted twice under 21 U.S.C. 174, for purchase and sale of the same illegally imported heroin. The Court of Appeals, per Judge (now Justice) Stewart, held that his claim of invalid double punishment was foreclosed by *Blockburger* v. *United States*, 284 U.S. 299, but the *Gore* decision, particularly as viewed in the light of *Ladner*, shows that it was not. The decisive factor seems to be whether the conduct is condemned by one statute or by two.

However, the number of statutes technically violated (*Gore*), as with the number of federal officers technically assaulted under 18 U.S.C. 254 (*Ladner*), frequently "will have little bearing upon the seriousness of the criminal act." *Ladner* v. *United States*, slip opinion, p. 7. Particularly is that true when, as here, the statutes all have the same purpose and the convictions may rest on the same evidence. The *Ladner* case, its implications and its reasoning, pointedly show the need for reconsidering *Gore* along the lines previously suggested by petitioner.

II.

The Blockburger Rule Requires Different Evidence to Support Each Conviction, Not Merely Different Statutory Language or Divergent Inferences From the Same Evidence.

The Government earnestly contends (Resp. Br. 17-20) that the evidence "required" to convict under each of the narcotics laws is measured by the relevant statutory language, and since this language differs under each statute, the different-evidence test is thus satisfied. That obviously is not so, however. If the statutory language were conclusive upon the question there would be no need at all for such a test. The double jeopardy clause would squarely cover the unlikely event of prosecution under two statutes framed in identical terms. Obviously the test refers to *evidence*, as its name and its classic formulation show. (*Blockburger* v. *United States*, 284 U.S. 299 at 304.) What is *required* is that the minimum evidence necessary to support conviction under each statute include proof of at least one different fact. (Of course, in urging reconsideration of *Gore* petitioner has also contended that the different fact should be one of substance, not of form alone.)

Moreover, the Government's argument is demonstrably wrong in view of the normal proof supplied under 21 U.S.C. 174, for example. It is safe to say that in very few such cases has the Government even tried to prove that in point of fact the drugs were illegally imported and the defendant knew them to be so. What it relies upon, as in this case, is a "not * * * illogical" inference (*Yee Hem* v. *United States*, 268 U.S. 178, 184)[2] arising from proven possession of the drugs, normally unstamped. If it is also "not * * * illogical" to infer from the same fact that petitioner participated in a sale of the unstamped drugs to a third person, *after* they left his possession,[3] that reasoning surely does not mean that new and different evidence was required (or offered) to establish the second crime. To the contrary. Nor does it matter whether the presumption is statutory in origin. The inference that petitioner, having aided Floyd to secure drugs in response to Fialkewicz's feigned plea, knew she would deliver them to him in violation of *three* different legal requirements, is nonetheless merely an inference with three variations, drawn from the same evidence.

However, the different-evidence rule forbids the use of such evidence to multiply punishment. It bears repeating that the Government seems very eager to grasp the advantages of the rule but unwilling to accept its correlative burdens.

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[2] Compare the standard of proof required even in civil cases where knowing membership in a politically suspect organization is the issue, e.g., *Wieman* v. *Updegraff*, 344 U.S. 183. It is at least absurd to suggest that such an inference as *Yee Hem* permits constitutes evidence within the meaning of the rule.

[3] The logic of this inference is even more doubtful. See *Tot* v. *United States*, 319 U.S. 463, and Pet. Br. 34-35.

III.

The Very Assumptions Which Respondent Is Forced to Make in Defense of the Claassen Rule as Applied Below Reveal the Defects of That Rule.

We believe the Government has misread the decision in *O'Connell* v. *Regina*, 11 Clark and F. 155, 8 Eng. Rep. 1061 (see Resp. Br. 24-5, n. 9)[4] just as it has erroneously assumed that petitioner agrees that his sentence was a "general" or a "gross" one (Resp. Br. 21). He did concede that a sentence imposed on multiple counts is inevitably referable in a sense to all of the counts (Pet. Br. 42), but that does not enable an appellate court applying the *Claassen* rule (142 U.S. 140, 146-7) to know how and in what degree it is so referable; and petitioner also noted that here the trial court imposed consecutive sentences on three particular counts "and there is no basis of record for assuming that that arrangement was purely fortuitous" (Pet. Br. 40). On the contrary, an appellate court, having no power to pierce the record or divine the thoughts of the trial judge, ought to assume that the distribution of consecutive sentences was deliberate. And if it was, respondent's own

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[4] Any fair reading of Lord Cottenham's opinion in that case (11 Clark and F. 388-403, 8 Eng. Rep. 1149-54) convinces one that he based his vote on general considerations rather than the particular record before him. Thus, he noted (4 Clark and F. at 402, 8 Eng. Rep. at 1154) that under Lord Mansfield's view a defendant might have no means of securing relief from a bad court or a bad finding: "It is certainly not improbable that it should happen, and it is sufficient that it is possible." It *has* happened here, of course.

Moreover, it is hardly relevant that Sec. 5 of the Statute of 7 Edw. 7, c. 23 changed the rule of the *O'Connell* case, because Sec. 4(3) of that same act gave the Court of Criminal Appeals plenary resentencing power even where the judgment of conviction itself was not appealed. See *Gore* v. *United States*, 357 U.S. 386 at 393.

footnote 8 (Br. 21) concedes that the case must be remanded and the *Claassen* rule cannot be applied.

But it is most revealing to consider the assumptions which the Government must make in order to defend that rule, for those assumptions themselves show the speculative and unfair operation of the rule:

(a) The Government assumes that the trial court's sentence was "gross" (Br. 21), but the very detail and arrangement of the sentence refute that notion. See R. 124-5, 125-6.

(b) Respondent assumes (Br. 22) that the Court of Appeals also viewed the sentence as gross or general, but the phrase "aggregate sentence" as used in that court's opinion (R. 131) is hardly synonymous with those terms; for they have reference to a single punishment allocated to all the counts. But *if* the court below did so view the sentence, it too was merely speculating without sufficient basis in the record before it.

(c) Respondent assumes, evidently along with the court below, that the trial court would have imposed the same punishment on a judgment only two-fifths as large (Br. 26-29). Indeed, it really asks this court to subscribe to the same guesswork and affirm on that basis!

(d) Respondent assumes that petitioner can in any event seek relief under Federal Rule of Criminal Procedure 35 (Br. 29). But he has no real basis for seeking such relief because the Court of Appeals indicated nothing in its affirmance. In the circumstances the rule is useless to petitioner. It might as well not exist.

(e) Lastly, respondent assumes that the trial judge gave more weight to the number of heroin capsules in

the case than to the number of counts (Br. 29-30), but in fact he spoke of both in the same short breath (R. 125). No one other than he can say what he would do if the same case came before him again based on 21 less capsules and 9, or even 13, less counts.

Inevitably the *Claassen* rule leads to this sort of fruitless, demonstrably unwarranted speculation. Inevitably the speculation resolves all doubts against the accused, possibly to his very great injury. There certainly is no question of, or analogy to, mootness (see Resp. Br. 26), for nothing would be more vital to the defendant than the quantum of his punishment.

The opinion of the court below was almost entirely subjunctive. It said no more than that *if* the trial judge would reimpose the same sentence in any event, five valid-but-unspecified counts would support his doing so. But *would* he in fact do so? And what counts *does* the record support? These issues are at the root of the matter for petitioner (as they are for all criminal defendants), and he is entitled to have them fairly and clearly answered. The *Claassen* rule as applied by the court below denied him this right, however.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 134.—October Term, 1958.

William C. Greene, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January 26, 1959.]

Per Curiam.

Petitioner was convicted in the United States District Court for the District of Columbia on each of 15 counts of an indictment for violations of the narcotic laws,[1] and as recited in the formal judgment was sentenced to imprisonment as follows:

> "Twenty (20) Months to Five (5) Years . . . on Count Two; Twenty (20) Months to Five Years . . . on Count Four, said sentence on Count Four to take effect [at] the expiration of sentence imposed on Count Two; Twenty (20) Months to Five Years . . . on Count Seven, said sentence on Count Seven to take effect at the expiration of sentence imposed on Count Four; Twenty Months to Five Years . . . on each of Counts One, Three, Five, Six, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen and Fifteen, said sentences by the counts to run concurrently and to run concurrently with the sentences on Counts Two, Four and Seven."

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[1] The Narcotic Drugs Import and Export Act, § 2 (c), 65 Stat. 767, 21 U. S. C. § 174; the Internal Revenue Code of 1954, §§ 4704 (a), 4705 (a), and 7237 (a), 68A Stat. 550–551, 860, as amended, 69 Stat. 3, 26 U. S. C. (Supp. III) §§ 4704 (a), 4705 (a), 7237 (a).

On his appeal, petitioner sought reversal of the conviction and sentence on each count upon the grounds of prejudicial procedural errors at the trial, insufficiency of the evidence to support the convictions and sentences, and invalid multiple punishments for single offenses. In a *per curiam* opinion the Court of Appeals held that "The record supports at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences. It therefore supports the aggregate sentence. We need not decide whether it suports the 'consecutive' sentences themselves. *Hirabayashi* v. *United States*, 320 U. S. 81, 85; *Wanzer* v. *United States*, 93 U. S. App. D. C. 412, 208 F. 2d 45." It thereupon affirmed, one judge dissenting, 100 U. S. App. D. C. 396, 246 F. 2d 677. Petitioner sought certiorari on the grounds that the sentences invalidly multiply punishments for single offenses, and that the Court of Appeals erred in failing to determine the validity of the several sentences and in holding that imprisonment for an aggregate period of 5 to 15 years is authorized by its finding that "at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences [are valid]." We granted the writ to determine those questions. 357 U. S. 934.

The Government contends here that the several sentences are in reality but one "gross sentence" to imprisonment for a period of 5 to 15 years, and that the holding of the Court of Appeals that at least 5 of the "concurrent" sentences are valid supports the judgment,[2] but it con-

[2] In support of its stated position the Government relies on its understanding of this Court's opinions in *Ex parte De Bara*, 179 U. S. 316, and *Ex parte Henry*, 123 U. S. 372. It also relies upon *Phillips* v. *United States*, 212 F. 2d 327, 335 (C. A. 8th Cir.); *Barnes* v. *United States*, 197 F. 2d 271, 273 (C. A. 8th Cir.); *Levine* v. *Hudspeth*, 127 F. 2d 982, 984 (C. A. 10th Cir.); *McKee* v. *Johnston*, 109 F. 2d 273, 275 (C. A. 9th Cir.); *Jackson* v. *Hudspeth*,

cedes that "If the sentence [may] not be considered as a gross sentence, at least as to the 12 counts which were to be concurrent with 2, 4, and 7, . . . the case would have to be remanded to the Court of Appeals to pass on the validity of counts 2, 4, and 7, [and] if it found any one of them invalid that court would then have to remand to the District Court for resentencing, since, assuming that the other counts cannot be considered in gross, it is not clear which of them, taken individually, were to be concurrent with 2, which with 4, and which with 7."

The question whether, in these circumstances, the law permits the imposition of a single "gross sentence" upon several counts exceeding the maximum sentence that may lawfully be imposed upon any one of such counts is not presented here, for we think the Government's contention that these 15 sentences were, or may be treated as, one "gross sentence" to imprisonment for a period of 5 to 15 years is unsupportable and is contradicted by the plain words of the recorded judgment. "The only sentence known to the law is the judgment entered on the records of the court." *Hill* v. *United States*, 298 U. S. 460, 464. The judgment entered on the records of the court in this case explicitly imposed a separate sentence of from 20 months to the then permissible maximum of 5 years [3] on

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111 F. 2d 128, 129 (C. A. 10th Cir.); *Ross* v. *Hudspeth*, 108 F. 2d 628, 629 (C. A. 10th Cir.); *Hawkins* v. *United States*, 14 F. 2d 596, 597–598 (C. A. 7th Cir.); *Klein* v. *United States*, 14 F. 2d 35, 37 (C. A. 1st Cir.); *Neely et al.* v. *United States*, 2 F. 2d 849, 852 (C. A. 4th Cir.).

[3] At the time of these alleged offenses, and prior to the enactment of the Narcotic Control Act of 1956, 70 Stat. 567, 570, § 2 (c) of the Narcotic Drug Import and Export Act (65 Stat. 767, 21 U. S. C. § 174) provided for imprisonment for its violation of "not less than two or more than five years," and § 7237 (a) of the Internal Revenue Code of 1954 (68A. Stat. 860) provided for imprisonment for the violation or conspiracy to violate §§ 4704 (a) or 4705 (a) of that Code of "not less than 2 or more than 5 years."

each of the 15 counts. It is therefore plain that the court did not impose one "gross sentence" to imprisonment for a period of 5 to 15 years.

The judgment makes the separate sentences on Counts Two, Four, and Seven to run consecutively. Thus, if each is valid, they in sequence authorize imprisonment for an aggregate period of 5 to 15 years. But the judgment makes the separate sentences on the other 12 counts to run concurrently with each other (hence for a total period of 20 months to 5 years) *and* "with the sentences on Counts Two, Four and Seven," without saying whether those "concurrent" sentences are to run with the sentence on Count Two, with the consecutive sentence on Count Four, or with the consecutive sentence on Count Seven. It is therefore evident that the Court of Appeals was in error in concluding that the 5 "concurrent" sentences which it thought were valid alone support an aggregate period of imprisonment of 5 to 15 years.

The rule that reversal is not required if any one of several concurrent sentences is valid and alone supports the sentence and judgment, *Hirabayashi* v. *United States*, 320 U. S. 81, 85, and cases cited; *Pinkerton* v. *United States*, 328 U. S. 640, 642, n. 1; *United States* v. *Sheridan*, 329 U. S. 379, 381; *Roviaro* v. *United States*, 353 U. S. 53, 59, n. 6; *Lawn* v. *United States*, 355 U. S. 339, 359, does not aid the Government, for no one of the "concurrent" sentences, or even all of them together, could, even if geared to a particular (though invalid) consecutive sentence, support imprisonment for more than 20 months to 5 years. If any one of the consecutive sentences on Counts Two, Four or Seven be invalid it cannot be said that such of the "concurrent" sentences as are valid will run with such invalid consecutive sentence, and thus support that much of the aggregate term of imprisonment, because the trial judge did not make the concurrent sentences to run with any particular one of the consecutive

sentences. It is therefore clear, under the present sentences, that imprisonment for an aggregate period of 5 to 15 years can be sustained only if each of the consecutive sentences on Counts Two, Four, and Seven is valid. Hence it is necessary for the Court of Appeals to pass upon the validity of the consecutive sentences. The judgment of the Court of Appeals is vacated and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.